

IN THE UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF TENNESSEE
 AT KNOXVILLE

UNITED STATES OF AMERICA

Plaintiff,

v.

MARK HAZELWOOD,
 SCOTT WOMBOLD,
 HEATHER JONES, and
 KAREN MANN,

Defendants.

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3:16-CR-20

Chattanooga, Tennessee
 February 12, 2018

BEFORE: THE HONORABLE CURTIS L. COLLIER
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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JURY TRIAL
TWENTY-FOURTH DAY OF TRIAL

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1 (Recess for deliberations.)

2 (The jury entered the courtroom, and the proceedings
3 continued, as follows:)

4 THE COURT: Ladies and gentlemen, the Court notes
5 it's about five minutes after noontime, and that means that
6 it's your lunchtime. Whenever you leave, it's necessary for
7 the Court to convene court and officially excuse you, for
8 lunch, or for breaks, or for the evening. So that's what we're
9 going to do now.

10 We did receive your communication. And if you have
11 not already received 11 additional copies of the indictment,
12 then we'll make sure that that is done.

13 The lawyers are looking at the second question that
14 you asked, and they will be getting with me as soon as
15 possible. We'll try to get you an answer to that soon.

16 So you are released for lunch. Why don't you plan
17 on taking about an hour or so. Probably some of you will
18 decide to each lunch together. And while you eat lunch
19 together, do not discuss the case. Find something else to
20 talk about. It's important that everyone hear what everyone
21 else has to say about the case. If some of you start
22 discussing the case, you'll start forming some preliminary
23 conclusions, and that's not fair to the people who did not
24 have a chance to participate in that particular conversation.

25 When you come back from lunch, once the 12th person

1 has arrived, you can begin deliberating again. Before that
2 12th person arrives, though, make sure you do not discuss the
3 case, for the same reasons. If you start discussing the case,
4 you'll form some preliminary opinions or conclusions, and
5 that's not fair to the jurors who were not there to hear what
6 was said. So you are now excused for lunch. Come back in
7 about an hour, and you can begin deliberating again when the
8 12th person has arrived. So the jury is now excused for
9 lunch.

10 (The jury exited the courtroom, and the proceedings
11 continued as follows:)

12 THE COURT: Please be seated.

13 This is the first time that we've convened court
14 since last week. And as we discussed last week, Mr. Wombold
15 is attending the funeral of his sister today. So he's not
16 here. We are not discussing anything of a factual matter. So
17 I'm not sure that there is a requirement that he be here. But
18 just for the sake of the record, I would like to get a
19 statement on behalf of all counsel that his presence can be
20 waived.

21 MR. KELLY: Yes, Your Honor, we would agree with
22 that, pursuant to our discussion last week. And we appreciate
23 the Court accommodating Mr. Wombold.

24 MR. VERNIA: And, Your Honor, we agree with that, and
25 also note for the record that Ms. Jones, with the Court's

1 permission, is also absent today.

2 MR. COOPER: Your Honor, we don't object to their
3 absence.

4 MR. DRUMHELLER: No objection from Mr. Hazelwood,
5 Your Honor.

6 THE COURT: Government?

7 MR. HAMILTON: We have no objection.

8 THE COURT: Okay. I anticipate that they're going to
9 take all today. I also expect, though, we'll be getting more
10 questions in the afternoon, especially once that first question
11 is answered. We've received a response from Mr. Hazelwood.
12 And if other counsel give the benefit of their thoughts on it,
13 also, once I receive all your input, the Court will endeavor to
14 combine that into an answer that we can provide to the Court --
15 to the jury, we will circulate that again; and once we get your
16 comments, the Court will try to decide what's the appropriate
17 response to make.

18 MR. VERNIA: Your Honor, do you want to hear them
19 now, or do you want to receive them in writing?

20 THE COURT: No, why don't you do it in writing.
21 Okay?

22 Okay. Is there anything-- Yes, sir.

23 MR. WOJCIK: One other matter, Your Honor. Just in
24 light of the defendants' joint objection initially to the
25 indictment being sent back to the jury, and then their request

1 for additional copies, we would simply request maybe a
2 one-sentence reminder be sent back with the indictments that
3 the indictments are not evidence themselves, they're merely
4 allegations.

5 THE COURT: Any objection to that?

6 MR. HAMILTON: We think that's already been
7 adequately covered by the instructions from the Court, and
8 would highlight something they -- I assume they have a copy of
9 the instructions back there.

10 THE COURTROOM DEPUTY: (Moving head up and down.)

11 THE COURT: Yeah, I don't see any harm in doing that.
12 So the Court will include a communication to the effect that,
13 "You requested additional copies of the indictment. Here are
14 the additional copies. Remember the earlier instruction that
15 the indictment is not evidence."

16 MR. WOJCIK: That's fine. Thank you, Your Honor.

17 THE COURT: That's fine? Okay. Anything further?

18 (Brief pause.)

19 MR. DRUMHELLER: Your Honor, I guess just a
20 logistical question. I apologize that we keep coming to the
21 Court to ask this question, but I want to make sure for
22 purposes of predictability with our client and the rest of the
23 team, do we need to be here when the jury returns from lunch in
24 an hour, or just again at the end of the day?

25 THE COURT: No, there is no requirement that we

1 convene court when they come back; it is only when they are
2 being dismissed. I think that's mostly for the record, so the
3 record can show when they're not deliberating. I think the
4 assumption is that other than what's said, they are
5 deliberating. So the next time definitely will be about 5:00.
6 If there is another question, though, it may be necessary to
7 convene court, especially if there is some disagreement about
8 the communication that would go back.

9 MR. DRUMHELLER: Thank you, Your Honor.

10 THE COURT: Ms. Lewis.

11 (Luncheon recess.)

12 (Recess for deliberations.)

13 (The proceedings were held outside the presence of
14 the jury, as follows:)

15 THE COURT: When we broke at lunch, the Court
16 announced that it would like to get a response from counsel
17 concerning the communication from the jury. The Court has
18 received those communications now. The Court has studied and
19 considered the responses from counsel, and the Court has
20 proposed an instruction the Court has distributed to counsel.

21 The first paragraph of the communication concerns
22 the request for copies of the indictment, and the Court
23 indicates that those copies will be provided. It also tells
24 the jury that the indictment is not evidence of guilt, it is
25 just the formal way that the defendants are told the crimes

1 they're accused of committing.

2 The remainder of the proposed instruction concerns
3 the jury's request for a definition of voluntary. And what
4 the Court does is to list the places in the instruction where
5 the word "voluntarily" is used, and then it tells them that
6 the word voluntary does not have a legal or technical meaning,
7 it should be considered in the way that they would use the
8 word in their common conversation, and then the Court provides
9 a dictionary definition, which is from *Webster's Third New*
10 *International Dictionary, Unabridged*.

11 Then the next paragraph connects the word with the
12 charge concerning the conspiracy, and informs the jury again
13 that a defendant must know the conspiracy's main purpose and
14 then the defendant must voluntarily join the conspiracy with
15 intent to help advance or achieve the conspiracy's goal or
16 goals.

17 Then, lastly, the draft instructs the jury that they
18 should consider all the instructions as a whole, and should
19 not focus on one particular part of the instruction or
20 anything in the instruction in isolation, that the best and
21 most accurate understanding comes from looking at the
22 instructions as a whole.

23 Mr. Hamilton, does the government have a position
24 with respect to the Court's draft?

25 MR. HAMILTON: The United States has no objection to

1 the proposed draft from the Court.

2 THE COURT: Thank you.

3 Mr. Hazelwood?

4 MR. HARDIN: Your Honor, we still would hope that the
5 word -- the Court would add the word intentional. That's our
6 only-- The language the Court has proposed, we don't object
7 to; but if we'd look at the second page, where it says -- I
8 guess it's the sixth line, "The instructions inform you that a
9 defendant must know of the conspiracy's main purpose and then
10 the defendant must --" and we would hope that intentionally --
11 voluntarily would be equated with intentionally, based on the
12 Tennessee District Court decision that we cited.

13 THE COURT: So you want to strike out the word
14 "voluntarily" and put in intentionally there?

15 MR. HARDIN: Yes, sir, or to -- I want -- if there is
16 a definition -- if the Court would put intentionally somewhere
17 in the "voluntarily" on the previous page, that would be fine.
18 We're still just asking that it be equated with intentionally.

19 MR. HAMILTON: Your Honor, may the government be
20 heard on that?

21 THE COURT: Okay.

22 MR. HAMILTON: We responded to that in our response
23 to the Court where we addressed this argument that has been
24 raised by both Mr. Wombold as well as Mr. Hazelwood asking for
25 intentionality to be expressed as part of the definition of

1 voluntariness. And as we pointed out, the Sixth Circuit has
2 already addressed this in the pattern jury instruction by
3 choosing to put "knowingly and voluntarily" rather than
4 knowingly and intentionally. And that district court case came
5 before Dharma, which is the case that the United States cited,
6 which is also in the Sixth Circuit pattern jury instructions
7 for that particular charge.

8 THE COURT: Is that correct, Mr. Hardin, that the
9 pattern instruction has taken out the word intentional with
10 respect to conspiracy?

11 MR. HARDIN: I can't answer that, Your Honor. I
12 don't know that.

13 THE COURT: Well, let me-- I don't remember, either.
14 Let me look at that, then, and I will see. If it is in the
15 pattern instruction, I will include it.

16 MR. HARDIN: Thank you.

17 THE COURT: If it's not, I will not.

18 MR. HARDIN: Thank you.

19 THE COURT: Mr. Wombold?

20 MR. RICHARDSON: Thank you, Your Honor.

21 We agree, and are fine, with most of the proposed
22 language. Did have a couple of concerns. One is the notion,
23 at the top of the second page, after the Court has dealt with
24 the notion of voluntarily, which -- which we have no objection
25 to, then the Court proceeds to define the word voluntary.

1 And before addressing what a good definition of
2 voluntary might be, I would note that, of course, that --
3 unless I'm much mistaken, the word voluntary doesn't appear in
4 the instructions, the word "voluntarily" does. And it does
5 raise the question of whether there needs to be a definition
6 of voluntary.

7 But I would say this. In the next paragraph,
8 "With --" the language is -- with respect to Count 1, it says,
9 "The word was used in connection with the requirement that a
10 person knowingly join and participate in a conspiracy." I
11 believe there that the reference there is meant to be to the
12 word "voluntarily," but the word voluntary was used
13 immediately above. So I wonder if there might be some
14 confusion, just the way it's written, about whether we're
15 talking about the word voluntarily or talking about the word
16 voluntary.

17 THE COURT: Why don't we just stick voluntarily in
18 after "word," then.

19 MR. RICHARDSON: That would certainly work there, to
20 clarify that; I think that is correct, Your Honor.

21 Then that gets us back to the notion for a
22 definition of the word voluntary. We think that if the Court
23 is inclined to provide a definition, that although the Court
24 has provided one definition from a reputable source, there
25 certainly are other definitions. We used the one from the

1 recent --

2 THE COURT: Are there better dictionaries than
3 *Webster's*? I thought *Webster's* was the gold standard.

4 MR. RICHARDSON: Well, it is certainly an excellent
5 one. There are other ones as well. I did read an article once
6 saying that there are certain people that don't happen to like
7 the way *Webster's* has done things over the years, but I can't
8 argue with the Court's identification of it as a reputable
9 source.

10 I would note that *Black's Law Dictionary*, of course,
11 is also, in legal circles, I think, a reputable source, and
12 therefore we had proposed a definition from the Tenth Edition
13 of *Black's Law Dictionary*.

14 THE COURT: I recognize *Black's*. Since we're telling
15 the jury that the word is used in the ordinary and common
16 meaning, I think if a lay person was going to refer to a
17 dictionary, they would refer to *Webster's* or one of the more
18 common dictionaries; I'm not sure they would go to *Black's*,
19 though. I think we use *Black's*, but we're kind of a
20 specialized or technical...

21 MR. RICHARDSON: That is true, Your Honor. They may
22 not reach, as lay persons, for *Black's Law Dictionary*. I do
23 think that the definition that *Black's* uses, though, does --
24 does happen to be as consistent with a commonsense notion as
25 would *Webster's*; but that's -- my personal opinion is that if a

1 juror was given the *Black's Law Dictionary* instruction, that
2 they would -- they would recognize it, it would comport with
3 their understanding. We think it might be a little more
4 descriptive and therefore more appropriate.

5 THE COURT: Is there anything in that definition, the
6 definition out of *Black's*, that's not covered by *Webster's*?

7 MR. RICHARDSON: Your Honor, I think it has the
8 notion of doing things by design or intention that may be a
9 little bit more specific than -- than what *Webster's* is saying
10 in focusing on -- on choice, things coming from one's choice or
11 from one's will, so, in that sense, maybe a little more
12 specific, maybe a little more descriptive, in that sense maybe
13 a little more helpful. That's not to say that there is
14 anything improper at all about the *Webster's* version, but we do
15 think this would be a good alternative.

16 I think, the other thing, if I look at the
17 *Merriam-Webster* definition as another possibility that we
18 happened to run just before coming over here, the notions that
19 were in the Court's proposed definition are in
20 *Merriam-Webster's* version, but it also provides a couple of
21 alternative definitions that are not included in what the
22 Court was saying.

23 So if we look at *Merriam-Webster's* definition,
24 Definition Number 1 is "proceeding from the will or from one's
25 own choice or consent," which definitely mirrors what the

1 Court has in the proposed instructions, but then it's got
2 second and third definitions, the second one being
3 "unconstrained by interference," and the third is "done by
4 design or intention." Those also could be, I think, helpful
5 notions. The third one matches what we were saying about
6 *Black's Law Dictionary*. And I suppose that my point, in that
7 sense, is, whereas the *Webster* definition is certainly an
8 appropriate one, there are also additional definitions from
9 other sources that also made sense and that are also, I think,
10 reputable definitions.

11 So I can't say that the Court's definition is
12 incorrect in any way. We would propose *Black's Law*
13 *Dictionary*, though, as one that may be a little more helpful,
14 a little more illustrative for the jury. And, alternatively,
15 we don't disagree with counsel for Mark Hazelwood in their
16 proposed definition.

17 THE COURT: Thank you.

18 MR. RICHARDSON: Thank you.

19 MR. VERNIA: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MR. VERNIA: Very briefly. On behalf of Heather
22 Jones, we have no objection to the majority of the instruction;
23 and it does incorporate, I think, our concerns, for the most
24 part. I'm speaking only with respect to the last sentence of
25 the second-to-last paragraph, and actually the last few words,

1 where it says "to help advance or achieve the conspiracy's goal
2 or goals." And my only concern about that, sir, is, I think
3 that we had submitted "goal," singular -- I'm sorry, "goals,"
4 plural. And the reason for that was, in part, because of
5 *United States vs. LaPointe*, 690 F.3d 434, 442, Sixth Circuit
6 decision in 2012, which essentially dealt with a situation
7 where there are multiple objectives of a conspiracy.

8 And I guess my only concern is, you know, there are
9 a number of goals of the conspiracy listed in the indictment
10 which, you know, were certainly not criminal acts, you know,
11 or were not criminal objectives, you know, for example,
12 increasing fuel sales. And I think the language "goal or
13 goals" may permit the jury to conclude that if Ms. Jones
14 intended to help increase fuel sales, for example, for a
15 noncriminal purpose, that may be sufficient to find her
16 guilty. So my only suggestion, Your Honor, would be to strike
17 the "goal or" from that last sentence. Thank you, sir.

18 THE COURT: And what would we substitute there? I
19 don't know it would be a sentence if we took that out. We
20 would have to put something in place of "goal or goals."

21 MR. VERNIA: I think it would be fine if it was "to
22 help advance or achieve the conspiracy's goals," plural.

23 THE COURT: Plural?

24 MR. VERNIA: Yes, sir.

25 THE COURT: Mr. Hamilton, any objection?

1 MR. HAMILTON: No, sir, not to that part.

2 THE COURT: Okay.

3 MR. HAMILTON: May I add on the point I had about the
4 pattern jury instructions, just to make -- to advise the Court
5 of what the pattern jury instruction said? I want to make
6 sure-- Because the Court didn't have the instructions in front
7 of it, may I just add a few comments to that, please?

8 THE COURT: Yes.

9 MR. HAMILTON: I looked up the -- while I was sitting
10 here, I looked that up, to make sure. And so here is what the
11 committee says, is that the committee recognized litigation and
12 the case law regarding the use of the term willfulness, and
13 what the -- what the committee decided was-- Excuse me. I got
14 the wrong document. Here we are. It says that "to avoid
15 confusion, the committee has substituted the word voluntarily
16 for willfully." So -- and when you look at the litigation
17 surrounding that, particularly -- and I said -- I think I said
18 *Dharma, Dharma*. It's actually *Damra, United States v. Damra*.
19 It's a 2010 Sixth Circuit decision that followed the district
20 court's decision that was cited by Mr. Hazelwood. He pointed
21 out -- in that decision it pointed out how that willfulness is
22 larger than voluntariness, and it signaled that voluntariness
23 does not necessarily always include willfulness and
24 intentionality.

25 And you can -- and when you look at the pattern jury

1 instructions and you look at the commentary related to it, it
2 is clear from the use notes that a great deal of thought has
3 been given to how to formulate this instruction and that
4 particular element, particularly the phrase "to avoid
5 confusion, the committee has substituted the word voluntary
6 for willfully."

7 And it's based on that premise, that analysis in the
8 use notes, that the United States submits that staying tied to
9 the pattern jury instructions is the appropriate thing to do
10 in this context.

11 MR. HARDIN: May I be heard briefly?

12 THE COURT: You may.

13 MR. HARDIN: That's what, I mean, I didn't know. I
14 wasn't aware that there had been a definition of voluntarily
15 that was taken out. What I understand the government to be
16 saying now I have no quarrel with, and that is that willful is
17 different than intentional and is different than voluntarily.
18 And so as to the-- The process he's describing there I don't
19 disagree with. My own view—and I believe I'm right about
20 this—is that there is no pattern jury charge, in the past or
21 future, definition of voluntarily.

22 So you're writing on a clean slate except for those
23 cases in which sometimes the court has said—and we just cited
24 a district court opinion, not a court of appeals opinion—that
25 it can mean intentional. I am only asking that there be one

1 of the definitions in the -- I didn't bring it back up, but I
2 can -- on the top paragraph on the second page, that as you
3 describe what it can be, you give several different meanings,
4 and we're only asking that one of those meanings can be
5 intentional.

6 THE COURT: As the Court said earlier, it will look
7 at that. We'll look at the pattern instructions.
8 *Merriam-Webster* and other dictionaries may do this, also, but
9 what *Webster's* does is, has a list of definitions, and the
10 first definition is the most generally recognized, the most
11 common understanding of the word; the second definition is the
12 next most commonly understood; and it goes down until it gets
13 to very unusual or very specific definitions.

14 And what I try to do is to limit myself either to
15 the most common one or the definition that might apply in the
16 particular circumstances. And I think here it's probably
17 the-most-commonly-understood-by-the-American-people
18 definition. So there are -- in *Webster's*, I'm looking back,
19 there must have been eight or nine definitions. And the Court
20 confined itself to the first one; the Court did not go to the
21 second, third, fourth, or fifth.

22 MR. HARDIN: Thank you, Judge.

23 MR. COOPER: Your Honor, on behalf of Karen Mann, I
24 would just note that it appears that the jury's question about
25 the definition of voluntary brings into sharp focus the

1 objection that we lodged regarding the second full paragraph on
2 Page 24 with regard to the defendant's connection to the
3 conspiracy. And so we have no objection to the proposed
4 language by the Court. We accept that instruction. But we
5 wish to remain -- or wish to renew on the record our original
6 objection to that paragraph on Page 24. Thank you.

7 THE COURT: Thank you.

8 The Court appreciates the time and the attention
9 given to this matter. The Court has agreed to put the word
10 voluntary in the first full paragraph between the word "word"
11 and the word "was." And then at the end of that paragraph,
12 the Court has agreed to take out the words "goal or."

13 And then with respect to the definition, the Court
14 has agreed to look at the pattern instructions to see how it
15 deals with the word -- or the concept of intent. And the
16 Court will take another look at *Black's* definition. And I
17 think that the definition in *Merriam-Webster's* that includes
18 intent is also one of the lesser definitions provided in
19 *Webster's*, which is the dictionary that the Court used.

20 Once the Court has done that, the Court will make a
21 decision, the Court will include that in the communication,
22 recirculate that to the parties. If the -- if the objection
23 is already stated, then there is no need to state it again,
24 it's already preserved. If there is a new objection, then let
25 the Court know, and we'll reconvene and discuss it. If there

1 are no new objections, then the Court will affix its signature
2 to the instruction and send it back to the jury.

3 We're going to let the jury go at 5:00. So that's
4 about 35, 40 minutes from now. So we'll reconvene at 5:00,
5 unless we reconvene earlier, and let the jury go for the day.

6 Mr. Hamilton?

7 MR. HAMILTON: May I just clarify one thing, Your
8 Honor? When you were going over what the Court intended to do
9 to address the question, I heard the Court say "the definition
10 of intent," and I just --

11 THE COURT: I think one of the definitions of
12 voluntarily includes something like "intentionally done," or
13 "done with intent," something like that.

14 MR. HAMILTON: Yes, sir.

15 THE COURT: That's in *Black's* dictionary, I take it.

16 MR. HARDIN: That's correct.

17 THE COURT: And perhaps it's one of the definitions
18 included in *Merriam-Webster's*.

19 MR. HAMILTON: Thank you, Your Honor, for helping to
20 clarify that. I just wanted to make sure if there were any
21 questions about what the Court was expressing on the record, it
22 was made clear. That's what I thought. I just wanted to make
23 sure. Thank you.

24 THE COURT: Okay.

25 MR. HAMILTON: And if I could just make one more

1 observation as relates to the *Black's Law Dictionary* point made
2 by counsel for Mr. Wombold, it's just to reiterate what we made
3 in our submission by way of e-mail to the Court, that the
4 "unconstrained" portion of that would, in fact, undermine the
5 portion that's on Page 24 as it relates to -- that following
6 the direction of an employee -- of a supervisor does not make
7 something involuntary. That was the last observation from the
8 government. Thank you, Your Honor.

9 THE COURT: Thank you.

10 Ms. Lewis.

11 (Recess for deliberations.)

12 THE COURT: Ladies and gentlemen, it's about six or
13 seven minutes after 5:00, so we're running a little bit over
14 time. I'm going to let you go. I'm going to ask you to come
15 back tomorrow.

16 Again, you'll remember that I tell you this each
17 time. While you're away from court, do not discuss the case
18 with anyone, do not allow anyone to discuss the case with you,
19 don't watch anything on television, listen to anything on the
20 radio, or read anything in the papers or on the Internet
21 concerning this case.

22 Come back tomorrow morning at 9:00, and, just as you
23 did when you came back from lunch, go back to the jury
24 deliberation room. Do not begin deliberating, though, until
25 the 12th person has arrived. Once that person has arrived,

1 you can start deliberating again. Be safe, eat a good dinner,
2 get a good night's sleep, and we'll see you tomorrow morning
3 at 9:00.

4 Ms. Lewis.

5 (Evening recess.)
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